televisions that were part of the set up of its trade show exhibition. The dispute between the parties arose when Oz disputed DCI's billing for charges and costs that were beyond the scope of the contractual agreement, and which were never authorized by Oz. Indeed, some of the charges involved services allegedly rendered that not only were never authorized but were never even disclosed to Oz until the invoice was rendered by DCI. Other charges and expenses for which DCI sought payment were for services, the authorization for which were specifically rejected by OZ when authorization was sought by DCI. Despite explicit representations that there would be no mark up charged for certain expenses that were authorized, DCI's invoices included substantial mark up for expenses incurred to transport and set up the trade show booth to different trade show locations. Moreover, DCI affirmatively breached the parties contract by failing to provide services that it was agreed would be provided, without charge, as part of the initial $420,000 cost for the construction of the trade show booth.

Despite the fact that Oz paid in full for the construction of the trade show booth and for the plasma televisions that were part of its exhibition, when Oz rightfully objected to being billed for additional charges and expenses that were never authorized, and for substantial mark up for transportation, storage and the unauthorized services of a subcontractor retained by DCI, DCI resorted to self help and seized and retained control of the trade show booth, the plasma televisions, and computers and laptops that were indisputably owned by Oz. As a consequence of the wrongful holding of Oz's booth and equipment as "ransom" for the payment of the disputed invoices, Oz was forced to incur expenses of $160,000 to another vendor for the temporary

use of a trade show booth in order to continue marketing its product at trade shows.

At a preliminary conference in October of 2002, the court set a discovery deadline date of February 28, 2003. The discovery deadline was later extended to April 15, 2003 because the parties were actively engaged in settlement negotiations. Discovery actually continued however into May of 2003 due to ongoing settlement discussions. When it became evident that despite lengthy discussions, the case could not be settled, Oz filed a motion for leave to amend its answer to assert a counterclaim for conversion, based on the seizure and retention of Oz's property. The damages that flowed from the conversion included the cost of a temporary trade show booth to replace the one seized by DCI. lost profits due to Oz being forced to use a lesser quality booth that was not effective as the booth Oz contracted for and paid for DCI to construct, and the value of the plasma screen televisions converted by DCI. Although at the time the Motion to Amend was filed, a trial date had not been scheduled (and the case was not actually tried until seven months later), and the amendment would have required only minimal discovery to establish the affirmative claim for damages on the counterclaim, the court denied the Motion to Amend because it concluded that "good cause" for extension of the deadline to amend pleadings had not been established.

As a consequence of the denial of the motion for leave to assert the counterclaim, at trial, the jury heard testimony about the cost incurred by Oz for a replacement trade show booth, but the jury was instructed that it could not award damages or affirmative relief to Oz. Oz' defense\claim for setoff \recoupment was ignored by the jury, which was not instructed on the law as to the legality\illegality of DCI

seizing Oz's property as ransom for payment of invoices with extracontractual, unauthorized charges and expenses.

The jury awarded DCI $42,044.91 less than the full amount of the disputed invoices it sought payment for, and obviously engaged in mathematical calculations, as the verdict was not in a round figure, but was for $492,766.01. Thus, it is clear the jury discredited to some extent DCI's claimed entitlement to payment of the charges and expenses that were neither agreed to in the contract nor authorized post contract, and\or credited Oz's defense that the charges were not authorized. It is however impossible to know exactly what expenses the jury "deducted" from the invoices, because the verdict form allowed for a "lump sum" damages verdict, without any delineation of what charges and expenses the jury allowed and disallowed.

The verdict was tainted by the failure to instruct the jury on the law of self help so as to meaningfully analyze Oz's defense of set off\recoupment. Moreover, despite a wealth of evidence at trial that the disputed invoices consisted of unauthorized charges, substantial markup for services and expenses that were contrary to the promised "no markup" policy, billing after the fact for undisclosed, unauthorized services and expenses, billing for the unauthorized services of an independent contractor retained by DCI without Oz's knowledge or consent, and billing (at a markup) for services that the contract required to be provided free of charge as part of the initial purchase of the trade show booth, Oz was deprived of meaningful appellate scrutiny of the verdict as against the weight of the evidence, as it is unknown what evidence the jury credited and what evidence it did not credit in arriving at an unusually specific, not round figure, as its damages verdict.

REASONS FOR GRANTING THE PETITION

The resort to Rule 16(b)'s "good cause" standard for the extension of a deadline set by a Pretrial Scheduling Order for the amendment of pleadings eviscerates the mandate of Rule 15(a) that leave to amend the pleadings is to be freely given in the interests of justice, and on the facts of this case, Rule 13(f)'s authority for the lower courts to permit a counterclaim to be asserted where the failure to earlier plead the counterclaim was the result of inadvertence or excusable neglect and the interests of justice require allowing the counterclaim to be asserted, because it is a compulsory counterclaim which is precluded if not pled in the pending action. The consequence in this case of the District court and Third Circuit utilizing the good cause standard as a basis to override Rules 15(a) and 13(f) is that Oz is forever precluded from pursuing the compulsory counterclaim that arose from the same facts and transactions that were the basis of the Plaintiff's complaint. Oz attempted to pursue the counterclaim in a litigation in the Canadian courts, but it was determined that the counterclaim was barred, confirming that the proper forum to litigate the claim was aa a counterclaim to DCI's Complaint.

That Oz was precluded from a full presentation of evidence at trial as to the wrongful conduct of DCI in converting Oz's property, and the damages the conversion caused to Oz not only deprived Oz of the opportunity for an affirmative recovery that would have exceeded DCI's claim, but it also hampered substantially Oz's ability to defend against DCI's claim for invoices inflated with unauthorized markups, charges and expenses that were neither disclosed nor authorized, and billing for services the contract required to be covered by the payment for the initial construction of

the trade show booth. It allowed DCI to paint an inaccurate picture of having rendered services and incurred expenses that a customer refused to pay, without an appreciation that DCI's response to a legitimate objection to paying for a half a million dollars worth of unauthorized expenses and obscene mark up of expenses is to hold the customer's property in order to extort payment of illegitmate charges, crippling the customer's ability to market its product, after the customer paid $420,000 to have a trade show booth in order to market its product.

The hampering of Oz's ability to fully and fairly defend against DCI's claim by the presentation of Oz's counterclaim was exacerbated by the fact that the setoff\recoupment defense was presented to the jury with absolutely no law to guide the jury's consideration of that defense, due to the failure to charge the jury on the law of self help. Further, the detailed presentation of evidence to refute and rebut specifically each and every category of charges and expenses sought by DCI was effectively meaningless for Oz where the general verdict form allowed the jury to award a "number" without any basis for the District Court on post verdict motions, or the Court of Appeals, on appeal, to know what expenses the jury credited and determined DCI was entitled to recover and what expenses sought the jury disallowed. Without a basis to understand the jury's mathematics, Oz was deprived of the ability to demonstrate specifically that the jury's verdict was against the weight of the evidence.

In combination, the inability to present evidence on the counterclaim at trial, the failure to instruct the jury on the law to consider the setoff \recoupment defense, and the failure to require a specific verdict form that would delineate the jury's decision on each category of charges and expenses

sought by DCI deprived OZ of a fair trial, and a fair opportunity for post verdict review by the District Court, and appellate review by the Court of Appeals, in order to correct the errors of the jury.

Allowance of the writ in this case will provide an appropriate vehicle for the Court to provide instruction to the lower courts on the obligation to charge the law fairly raised by the trial evidence, and the desirability of specific verdict forms to facilitate meaningful post verdict and appellate review of jury verdicts.

I. Review Is Warranted To Correct The Error Of The Lower Courts In Erroneously Analyzing The Motion For Leave To Amend The Answer To Assert A Compulsory Counterclaim Under The Good Cause Standard Of Fed. R. Civ. Proc. 16(b), Thereby Eviscerating The Requirements Of Fed. R. Civ. Proc. 13(f) That A Counterclaim Be Allowed When The Interests Of Justice Require And The Identical Standard Of Fed. R. Civ. Proc. 15(a) That Leave To Amend The Pleadings Is To Be Freely Granted In The Interest Of Justice

Since in this case, leave to amend was sought to assert a compulsory counterclaim, both Fed. R. Civ. Proc. 15(a), governing the amendment of pleadings, and Fed. R. Civ. Proc. 13(f) governing the assertion of a counterclaim apply, and provide the standard the lower courts were required to apply in considering the application for leave to amend to assert a counterclaim, and the review of the Magistrate Judge's denial of leave to amend. Both Rules employ an interest of justice standard that unquestionably was met in this case; it was error to deny an amendment clearly dictated by the interests

of justice on the basis of the good cause standard of Fed. R. Civ. Proc. 16(b). Moreover, even if the good cause standard was properly part of the analysis, it was satisfied in this case, and the denial of the motion for leave to assert the counterclaim was error which not only deprived Petitioner of the right to an affirmative recovery that would have exceeded the Plaintiff's claim, but also tainted the verdict, in that it deprived Petitioner of a fair trial in defense of DCI's claims, thus warranting a new trial.

Fed. R. Civ. Proc. 15 (a) instructs that a motion for leave to amend the pleadings shall be freely given when justice so requires. This Court has instructed that in the exercise of their discretion to decide motions for leave to amend the pleadings, the District Courts are to heed the mandate of Rule 15(a) that amendments are to be freely granted in the interests of justice. *Forman v. Davis*, 371 U.S. 178, 182 (1962). A District court may deny leave to amend the pleadings if there is **undue** delay in seeking leave to amend, the seeking of leave to amend is motivated by bad faith, or the amendment would be prejudicial to the opposing party. *Id.* None of the factors that would warrant the exercise of discretion to deny the amendment were present in this case, and the context of seeking leave to amend satisfied the requirement that justice required granting leave to amend.

The slight delay in seeking the leave to assert the counterclaim was not undue. Oz sought leave to amend its Answer to assert the counterclaim only eight months after the answer was filed. The Motion for leave to amend was filed four and one half months after the deadline set to amend pleadings. No trial date had been set and indeed the trial was seven months later. That length of delay is not undue and would not justify denial of the leave to amend, where the

parties were engaged in settlement negotiations. The original discovery deadline was extended because it would not have been productive to expend efforts on discovery when the parties were attempting to amicably resolve the litigation, and indeed discovery actually continued past the extended discovery deadline date, into May of 2003 because of ongoing settlement discussions.

It would have been even more counterproductive to engaging in fruitful settlement discussions to simultaneously file a Motion seeking leave to assert a counterclaim that would exceed the affirmative relief sought by DCI. In the same manner that settlement discussions warranted an extension of the original discovery deadline, it explained a good faith reason for the slight delay in seeking leave to amend. Nor was there any basis to find that the amendment was motivated by bad faith. Only when good faith efforts to resolve the case failed did Oz seek leave to amend to assert the counterclaim. The counterclaim was well grounded in fact and law and asserted in good faith. It was never disputed that DCI seized and maintained the trade show booth that had been fully paid for as well as other equipment that was owned by Oz. It was never in dispute that the reason DCI held and refused to return to Oz the booth and other property it owned was because there was a legitimate objection to a half a million dollar invoice that was inflated and padded with a host of unauthorized charges and markups that were directly contrary to the no markup policy. It was consistently DCI's position that the booth and equipment would be returned to Oz if he capitulated and paid the invoice, notwithstanding legitimate objection to unauthorized charges and being billed for services that were supposed to be provided inclusive with the payment for the construction of the booth. The undisputed facts were more than sufficient to

assert a cause of action for conversion, a cause of action that requires demonstrating that one has exercised unauthorized dominion and control over the property of another inconsistent with or to the exclusion of others. *Chemical Bank v. Miller Yacht Sales*, 173 N.J. Super. 90, 99-100 (App. Div. 1980). That there was a reasonable basis in fact and law for a counterclaim for conversion dispelled any basis to deny the motion for leave to amend as motivated by bad faith.

The amendment would not have resulted in any prejudice to DCI that would justify denial of leave to amend. Since it was undisputed that DCI retained the booth and equipment in order to extract payment of its bill, the facts that bore on the conversion cause of action would not have required additional discovery. On the liability issue of the conversion cause of action, it was solely a question of law whether the unauthorized retention of the booth and equipment constituted conversion. Only minimal and finite discovery would have been required to establish the damages for conversion. Even without the counterclaim, the evidence at trial included the $160,000 expense Oz incurred for a temporary replacement booth. Limited discovery consisting of an expert to quantify Oz's lost profits flowing from the conversion, and the fair market value of the plasma television screens is the only additional discovery that would have been necessitated by the amendment; any prejudice to DCI would have been eliminated by a short extension of discovery to allow DCI discovery to meet the damages claim on the conversion counterclaim. Rigid adherence to the deadline of the Pretrial Scheduling Order was erroneous, where discovery was extended because the parties did not pursue discovery while engaged in settlement discussions. Since the settlement discussions were also what caused the short delay in asserting the counterclaim, it would have been equally appropriate to

extend discovery to allow DCI to conduct discovery on the damages that flowed from the conversion counterclaim.

In sum, under Fed. R. Civ. Proc. 15(a) , the interests of justice dictated that leave to amend should have been granted, and there were no countervailing considerations of undue delay, bad faith or prejudice that justified denial of leave to amend. Further, that the appropriate exercise of discretion required allowing leave to amend the answer to assert the counterclaim is buttressed by consideration under Fed. R. Civ. Proc. 13(f). The record below included the fact that there was a breakdown in communication between Petitioner and its counsel that contributed to the delay in seeking leave to file a counterclaim. Indeed, the record below also included that Petitioner discharged its counsel and retained new counsel one day after the Magistrate Judge denied the motion for leave to amend. A breakdown in communication between Petitioner and its counsel resulting in a short delay in seeking leave to assert the counterclaim is sufficient to meet the inadvertence and\or excusable neglect standard of Fed. R. Civ. Proc. 13(f). *Eastern Minerals & Chemicals Co. v. Mahan*, 225 F.3d 330 (3d Cir. 2000). That fact, coupled with all of the other relevant factors as addressed above, dictated granting the motion for leave to amend as required by the interests of justice. The equities that weighed in favor of permitting Oz to assert the counterclaim were particularly compelling where it was a compulsory counterclaim, precluded when Oz was not permitted leave to assert it in the action by DCI. *Budd Co. v. Travelers' Indemnity Co.*, 820 F.2d 787 (6th Cir. 1987); *Xerox Corporation v. SCM Corporation*, 576 F.2d 1057, 1059 (3d Cir. 1978).

Alternatively, assuming for analysis that it was appropriate for the lower courts to consider the good cause standard of Fed. R. Civ. Proc. 16(b) as part of the analysis, the same factors established that there was good cause to extend the deadline to amend pleadings. That there was a delay while settlement negotiations were ongoing, the breakdown in communication with counsel, the merits of the counterclaim, and the fact that discovery was extended independent of the counterclaim all established good cause to extend the deadline, and the rigid adherence to schedule, at the cost of Oz losing altogether the right to assert the counterclaim, was erroneous. Because the denial of the amendment also infected the trial and verdict, as set forth above, the error in denying the amendment required reversing the judgment entered on the jury verdict, and remanding for a new trial to include trial on the counterclaim.

II. Review Is Warranted Because The Lack Of Jury Instruction On Self Help Rendered The Defense Of Self Help\Recoupment Meaningless And Deprived Petitioner Of A Fair Trial; The Use Of A General Verdict Form On A Multi Faceted Damages Claim Deprived Petitioner Of Effective Post Verdict And Appellate Review Designed To Correct Jury Error

Despite uncontradicted evidence that DCI made a unilateral decision that its "remedy" for a customer voicing legitimate objection to being billed for unauthorized charges and expenses was to seize property the customer paid for and rightfully owned, together with unrebutted testimony that the seizure of the booth and equipment caused Oz to incur $160,000 in expenses for a replacement booth, the jury completely disregarded the setoff\recoupment defense. That result is not surprising, however when it is considered

that although armed with uncontested facts, the jury was not provided with **any** law to guide its analysis of those facts. The jury was not provided with the relevant law on self help to guide it in determining what the legal consequence of DCI's use of self help was. Without a charge to decide whether the resort to self help was or was not appropriate, and what consequence would flow if the jury determined the self help was wrongful, the jury could not have reached any result other than to disregard the setoff\recoupment claim. Without being instructed on law and how that law applied to the facts, the jury could only conclude that the facts surrounding the resort to self help, although undisputed, were irrelevant to the deliberation process and rendering of a verdict. Where the jury disregarded a defense for which the facts were undisputed, the only conclusion can be that the failure to charge the relevant law was of sufficient magnitude as to constitute a miscarriage of justice and warrant a new trial.

The evidence presented at trial established that there were a myriad of categories of expenses and charges included on the disputed bills, and that the justification proffered by the Plaintiff varied greatly for the different categories. Further, Oz presented quite specific evidence to rebut that the different categories were never authorized, were outside of or in contradiction to the contract terms, or in some cases, were explicitly rejected by Oz when approval was sought. This was not an "all or nothing" case where the jury would either believe or disbelieve that DCI was entitled to recover the charges and expenses it sought as a whole. Rather, the evidence as presented at trial required the jury to consider the evidence presented at trial as to each category of expenses\charges claimed. The evidence at trial, and the issues as framed by the trial evidence, required a verdict form

that would have the jury delineate specifically what charges and expenses it was awarding to DCI.

The materiality of the error in using a general verdict form became evident when the jury returned a verdict that was more than $42,000 less than what DCI sought. While it is obvious the jury discredited some portion of the charges sought, the lump sum damages verdict makes it impossible to discern what the jury deducted in arriving at its verdict. The inability to discern what the jury deducted from the total recovery sought substantially prejudiced Oz in its post verdict motion for judgment notwithstanding the verdict. Oz's motion for judgment and\or for a new trial was premised in part on demonstrating that the conclusion that DCI was entitled to recover for the disputed charges was against the weight of the evidence. Yet the post verdict review and appellate review of the demonstration that the verdict was against the weight of the evidence was severely hampered by the inability to know what the jury did and did not include in its damages verdict.

The severe limitation on post verdict and appellate review of the damages verdict was material in light of the very substantial evidence at trial that rebutted DCI's entitlement to recovery for each category of charges sought.

Oz was induced to contract for the construction of the trade show booth by DCI, notwithstanding that the price was more than double what Oz originally budgeted for a trade show booth, by DCI's agreement to provide, free of charge, "white collar" supervision for the trade shows for a period of one year. The evidence at trial could only rationally support a conclusion that DCI breached the contract by failing to provide free white collar supervision, in one of two ways.

Either DCI breached the contract by failing to provide the promised white collar supervision without charge, or that DCI provided white collar supervision by an independent contractor it retained without Oz's authorization, a Mr. Trybulec. Not only was Oz billed for the services of Mr. Trybulec despite never authorizing DCI to retain him, but DCI added a substantial markup to its actual cost to have Trybulec render services. If the jury deemed that DCI was not in breach of the agreement to provide white collar supervision, because it was provided by Trybulec, then DCI breached the contract by failing to provide white collar supervision free of charge. Oz was not only billed for Trybulec's white collar supervision, it was billed for Trybulec's services at a markup, despite the agreement that there would be no markup. Moreover, despite the fact that Oz explicitly rejected DCI's proposal for multi media and software design work, and retained a different contractor to perform that work, at least part of the unauthorized services for which DCI retained Trybulec, and billed Oz for, were multi media and software design services.

Trybulec's services were not the only charges that were marked up contrary to the no mark up policy contracted for. Equipment purchased for the trade show booth was not billed at cost but was also marked up, as were expenses for freight to transport the booth to trade shows and travel expenses for the personnel that attended the trade show to oversee the set up of the booth and the running of the exhibit at the trade show. Oz was billed for "refurbishing" the booth after a trade show, although this expense was neither provided for in the contract nor ever authorized by Oz. The contract price was to be inclusive of storage charges for the booth, yet Oz was billed for storage. Without authority in the contract or post contract from Oz, DCI billed for "handling" charges and internal labor costs as well.

The above is only a short synopsis of the substantial trial evidence that countered, point by point, charge by charge, dollar by dollar, DCI's entitlement to recover for inflated, unauthorized expenses, despite its uncontradicted breach of the contract in failing to provide for free white collar supervision. The synopsis is sufficient to demonstrate that a lump sum verdict that rendered impossible post verdict scrutiny of the judgment as against the weight of the evidence and appellate review impossible deprived Oz of a fair trial and meaningful post verdict review to correct the jury's errors.

In combination, the prejudicial denial of the right to litigate the counterclaim, the failure to provide the jury with law to guide the consideration of the setoff\recoupment defense, and the failure to use a specific jury verdict form to delineate what damages were awarded and which claims were discredited completely deprived Oz of the right to a fair trial and so infects the verdict as to require reversal and remand for a new trial, to include the counterclaim.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

PETER A. OUDA
PETER A. OUDA, LLC
19 North Bridge Street
Somerville, NJ 08876
(908) 953-9300

Attorneys for Petitioner